No case.

New Jersey
Court of Errors and Appeals

St. Vincent's Church, Madison, a corporation, Respondent and Prosecutor, vs. The Council of the Borough of Madison, *et als.*, Appellants and Defendants.	On Certiorari.

BRIEF FOR APPELLANTS

Facts

The Borough of Madison installed a sewerage system within the borough immediately prior to March 21, 1912, in acordance with the laws of this State. On that date the council of the borough, by resolution, ascertained the costs and directed the commissioners of assessment of the borough to make a "just and equitable assessment" according to the statutes of the State. The preliminary steps were observed and the commissioners filed their report, bearing date September 30, 1912, with the council, and included in their report an assessment against St. Vincent's Church for two hundred and sixty-four dollars on what they designated in their report as "Wilmer

Street—east side'' portion of the property of the prosecutor; their report shows that, in their opinion, the sums assessed do not ''exceed the benefits which the said lands and each of the said owners are deemed by us to have derived from said improvements.'' They further certified that they made ''a just and equitable assessment.'' The property covered by the particular assessment was separated from Wilmer Street by a one-foot strip of land owned by one Alice L. Greene. The property of the prosecutor consisted of a tract of land having a considerable frontage on Green Village Road and extending back to the lands of the Presbyterian Church, a distance of nearly 600 feet and bounded on the west by the one-foot strip of Alice L. Greene and on the east by lands of Charles A. Rathbun, Edwin P. Felch and Miller Brothers. The case shows that the commissioners in making their assessments treated all corner properties as having a depth of 100 feet and that in making the assessment of the church property they made an assessment against the Green Village Road frontage considering the lot as having a depth of 100 feet, and the remaining portion they designated as being the Wilmer Street portion. On the Green Village Road frontage the church and rectory are located, and on the rear, or Wilmer Street portion, the parochial school and the sexton's house are located. The case further shows that the sexton's house is sewered by means of pipes running through the land of the public school of Madison and that it was planned to connect the parochial school with the same pipe line (case, p. 9; case p. 13, l. 10 to 30). Since the case was begun the plans for sewering the school building have been carried out.

Due notice of the report of the commissioners was given and formal objection was made by the respondent to the confirmation of the report. The

report was then referred to a committee of the council who (case, p. 34) reported adversely to the respondent and, thereupon, the council adopted a resolution confirming the report in so far as the respondent was concerned (case, pp. 31, 32, 33).

POINTS

I

The writ of certiorari was improvidently issued and therefore should have been dismissed or quashed.

Section 92 of the Borough Act provides as follows:

> "No certiorari * * * shall be allowed or granted * * * to set aside any assessment made for any sewer or street improvement of any kind, after thirty days shall have elapsed from the date of the confirmation of such assesment by the council."

The report of the commissioners of assessment was confirmed at a meeting of the council of the borough held November 25, 1912 (case, p. 31). The reasons in support of the writ of certiorari (case, p. 2) and the affidavit in support thereof (case, p. 4) show that they were not filed until December 27, 1912, while the writ of certiorari (case, p. 7) shows that it was issued December 28, 1912; in one case 32 days and in the other 33 days after the date of confirmation.

The Supreme Court disposed of this point by asserting that a rule to show cause had been issued at an earlier date. I don't know how the

Court was thus informed. No rule was issued at any time. It is true that notice of intention of applying for the writ was given before the time fixed in the statute but this does not meet the prohibition of the statute nor do the cases cited in the opinion of the Supreme Court aid the situation for the respondent. In these cases the Court's action was what caused the delay and this would have been the case here if a rule to show cause had been issued. In this case the infirmity is due to the delay of the respondent.

The writ should have been dismissed or quashed notwithstanding its having been allowed.

State, Wetmore vs. Elizabeth, 41 N. J. Law, 152.

State, Weart vs. Jersey City, 41 N. J. Law, 510, at page 514.

II

The writ should have been quashed because of the nonjoinder and misjoinder of parties and because it is misdirected.

The writ is directed to the council of the Borough of Madison, to the clerk of the Borough of Madison and to the collector of the Borough of Madison. The council of a borough is composed of the mayor and councilmen. Section 23 of the Borough Acts reads: "The Mayor and councilmen of every borough shall constitute the council thereof." The return to the writ of certiorari was made by the gentlemen composing the council of the Borough of Madison, *viz.*, the mayor and six councilmen (case, pp. 18 and 19). The writ was directed to them and by them the return was made. The clerk of the borough and the collector of the borough joined in the return. As to

the collector, it is clear that he could certify merely as to the copy of the commissioners' report certified to him by the borough clerk because that was all that was in his possession. It is clear that the mayor and councilmen should not have been parties to this proceeding and their return can be of no benefit to the respondent. They have been misjoined as parties and certainly as to them the writ should have been quashed.

Kirkpatrick vs. Commissioners, 42 N. J. Law, 510.

This would only leave the clerk and the collector as parties to this proceeding and certainly any judgment against them would not be effective as against the Borough of Madison. Both are mere agents of the municipality.

In the case of *Davis vs. Town of Harrison,* 46 N. J. Law, 79, at page 86, Justice Magie says:

> "The rule is that the writ should be directed to the person, who, in legal contemplation, has the custody of the record to be certified. *Morris Canal ads. State,* 2 Green, 411; *Kirkpatrick v. Commissioners,* 13 Vroom., 510. But this has never been construed as requiring the writ to be directed to a mere subordinate officer of a Court or a municipal corporation, though he may be in actual possession of the record. His custody is that of the Court or corporation whose officer he is. The practice, therefore, is to direct the writ to the principal, and not to the mere agent."

There being nonjoinder as well as misjoinder, the writ should have been quashed as to the other defendants also.

If it should be suggested that the municipality's name might be as designated in the writ "council of the Borough of Madison," I think the

sufficient answer is that no statute in this State has ever authorized such a name for any borough and therefore the Court will take judicial notice that this is not the name of the municipality. An examination of the statute shows that only two names might be possible. Under the original Borough Act, the title was "The Mayor and Council of the Borough of....." which might be changed by appropriate resolution to "The Borough of.....," or, if by original enactment under the revised Borough Act, "The Borough of....."

Moreover, the Court will take judicial notice of its own record from which it appears that the Borough of Madison has been a party to proceedings heretofore and, for convenience of reference, citation is made to cases of:

Florham Park vs. The Borough of Madison, 77 N. J. Law, 260; 72 Atl., 4.

Harrison vs. The Borough of Madison, 78 Atl., 665.

Stemmler vs. The Borough of Madison, 83 Atl., 85.

III

The assessment made against the respondent was legal under the Borough Act.

Section 58 of the Borough Act (1 C. S., 261), reads as follows:

> "The commissioners of assessment shall attend at the time and place appointed; two of them shall be a quorum for the transaction of business, and sufficient to make any assessment, but one member shall have power to adjourn any meeting; the commissioners may adjourn from time to

time; they shall give all parties interested in or affected by the improvement ample opportunity to be heard upon the subject of the assessment; they shall view the premises and have power to examine witnesses under oath or affirmation administered by any one of them; they shall thereupon make a just and equitable assessment of the damages sustained by or *benefits conferred upon any lands or real estate by reason of such improvement,* as the case may be, having due regard to the rights and interests of all persons concerned, as well as to the value of the lands and real estate taken, damaged or benefited; they shall certify their assessments to the council by a report in writing, signed by at least two of their number; said report shall be accompanied by a map showing the lands and real estate taken, damaged or benefited by said improvement and for which they have assessed damages or benefits; such report may be considered by the council at any meeting of which at least two weeks' previous notice shall have been given by the clerk, posted in five public places in the borough, or published in a newspaper circulating in the borough once in each week for two weeks prior to such meeting, as the council may direct, and also served personally upon the owner or owners named in said report, if resident in said borough, or if non-residents, by mailing a copy of said notice to such owner or owners, directed to them at their postoffice address, if the same can be ascertained, and by posting the same conspicuously upon some part or parts of said lands; the affidavit of said clerk shall

be conclusive as to the manner of such service, and shall be attached to the report as a part thereof; the notice shall briefly state the object of the meeting with reference to said assessments; at that or any subsequent meeting the council, after considering the said report and map, shall and may adopt and confirm the same with or without alterations, as to them may seem proper; it shall be lawful for the said council to refer the matter to any committee or committee of their own body for further examination before taking final action upon it; and when the report shall be so adopted and confirmed, with or without alterations, the same shall be final and conclusive upon all parties, except as to such assessments, from which appeals may be taken as hereinafter provided."

This section is in contrast with the original section as found in the Borough Act revision (P. L., 1897, page 312). In the original, this section contained this clause as to the duties of the commissioners, to wit:

> "They shall thereupon make a just and equitable assessment of the damages or benefits, as the case may be, separately along the line of the improvement, and with due regard to the rights, and interests of all persons concerned, as well as to the value of the lands and real estate taken, damaged or benefited."

The provision limiting the assessment to the lands "along the line of improvement" was eliminated by the amendment found in P. L., 1898, page 399, and this section was afterwards amended to its present form by P. L., 1899, page 171.

It is no longer the law that lands not along the line of improvement can not be assessed for benefits conferred.

> Allison Land Co. vs. Borough of Tenafly, 69 N. J. Law, 587 (55 Atl., 39);
> and
> Allison Land Co. vs. Borough of Tenafly, 52 Atl., 231.

The report of the commissioners of assessment (case, p. 21 *et seq.*) shows that all the details prescribed by Section 58 of the Borough Act were fully complied with in so far as the commissioners are concerned, and at page 22, lines 20 to 30 the exact language of the statute is adopted by the commissioners and is as follows:

> "We do further report that we have made a just and equitable assessment of the damages sustained by the respective owners of the lands affected by said improvement and the benefits conferred upon any lands or real estate by reason of said improvement, as before stated, having due regard to the rights and interests of all persons concerned, as well as to the value of the lands and interests damaged or benefited."

At page 23, lines 10 to 20, the commissioners assert that the assessments do not exceed the benefits, in this language:

> "We do further certify and report that said sums so assessed as aforesaid, in our opinion do not exceed the benefits which the said lands and each of the said owners are deemed by us to have derived from said improvements;
>
> "We do further certify and report that in our opinion no damages have been sustained by any of the owners of any lands

> or real estate by reason of the said improvement."

The testimony of Mr. Benjamin, one of the commissioners (case, p. 15) shows that, in his opinion,

> "the assessments against St. Vincent's Church property both as to the Green Village Road part and Wilmer Street part do not exceed the benefits conferred"

and, in his opinion, "are very moderate."

He further says:

> "In my opinion the assessment against this property both as to Green Village Road and Wilmer Street were just and equitable and compared favorably with those assessed against other properties in Madison."

Mr. Reynolds, another of the commissioners, testified to the same effect (case, p. 14, l. 10 to 20) and Mr. Larison, another of the commissioners (who is incorrectly designated as "Harrison" in the case) (case, p. 17) testified to the same effect.

The respondent did not offer any testimony whatever to show that the assessment made was not equitable and just, nor to show that its lands were not benefited to the extent reported by the commissioners of assessments, and therefore this case is entirely devoid of anything, except the affidavit of J. W. McDowell (case, p. 4, *et seq.*) (which certainly is not evidential, and is improperly set out in the books), to show that the assessment made by the commissioners against the respondent was not just and equitable, or that the lands were not benefited to the extent they were assessed. Although this land is separated from the street by a one-foot strip, yet it is very clear that its market value is greater because of the sewer being laid in Wilmer Street than if the

sewer were not laid there. If Alice L. Greene, the owner of the one-foot strip, should desire to purchase the property of the St. Vincent's Church, she would undoubtedly pay more for it because of the sewer being laid in the street, and so would anyone else who might acquire title to both properties. With the acquisition of the one-foot strip by the St. Vincent's Church, they would have immediate access to the sewer. If the mere fact that a one-foot strip intervened between the roadway and other land should prevent the other land being assessed for benefits, public improvements in many side streets would have to be made without the right to assess, and the whole burden would fall upon the public. The intent of the statute is, that it is the benefit to the property and not to the individual owner which is to be assessed. If this be true, then the mere difference in ownership of the two properties would not save the rear portion from being assessed under the Borough Act.

Adams vs. South Orange (1912), 85 Atl., 351 at 352.

It was claimed by the Supreme Court that *Allison Land Company vs. Borough of Tenafly* (*ibid.*) does not apply because that related to street improvements. It is true that only street improvements were involved in that case and it may be that, because of the relation of Section 58 to Section 33 of the Borough Act, the only assessments therein contemplated are those affecting improvements mentioned in Section 33. If Section 58 relates to all assessments, then it is clear that only one method is prescribed and it applies to sewer improvements as well as road improvements and, if it does, then this assessment should have been confirmed.

In *Van Wagoner vs. Paterson,* 67 N. J. Law, 455, a large tract of land had been assessed as

city lots for benefits conferred by the construction of a sewer system and this was upheld. It is true there was the one owner, but the separation from the sewer main was much greater than in this case.

This Court has recognized the fact that benefits may accrue to lands even in cases where lateral or connecting sewers must be built before the lands can be connected and that in such cases the assessment is merely "an ascertainment of benefits." *Vreeland vs. Bayonne*, 60 N. J. Law, 168 at page 169. And this was in a case where more work had to be done by the city. But in the case at bar nothing remains to be done by the borough of Madison. The sewers have been constructed —no extension or lateral is necessary to be laid by the borough. Merely a change of ownership or the acquisition of a privilege or right by respondent of, or over, the one-foot strip. Is it possible that the mere "accident of ownership" is to determine whether land is benefited within the meaning of the statute, or not? Is not all land within a reasonable area of a sewer assessable for benefits regardless of the question of ownership? If not, then it will be necessary for municipalities to search the titles of all lands before making improvements lest a greater liability should fall upon the people at large than anticipated.

In *Vreeland vs. Bayonne* (*ibid.*) the Court said at page 170:

> "The benefits to flow from the construction of lateral or connecting sewers can not be assessed until such lateral or connecting sewers are built.
>
> "As to the latter benefits, the problem would be incapable of solution because the cost of the work would not be known until it was done.

"The benefits flowing from the existing sewers can be ascertained as readily before the connecting sewers are completed as afterwards.

"Like assessments are frequently made on lands not fronting on the line of the improvement, as in the case of opening of new streets. Lands not on the line of such new streets may be held to be in the area of assessable property, and benefits accruing to them included in the assessment."

In *State, Frevert vs. Bayonne,* 63 N. J. L., 202, (Supreme Court, 1899) Justice Collins at page 205 says:

"I know no better standard in a case like this than the enhancement of *market value.* The advantage of sewerage facilities is fairly measurable and can not differ greatly in property of the same general class."

At page 206 he says:

"Uniform assessments *based on enhancement of value* would be intelligible and so would assessments, within absolute benefits, based on actual proportions of advantage to individual lots."

At page 205 he also says:

"While the general rule is that the Court is loath to disturb an assessment on an allegation that it is excessive and will never permit the report of the commissioners to be overcome except by proof of very great force, still, when it clearly appears by such proof that the assessment does in fact greatly exceed the benefits received from the improvement, it is the Court's duty to set it aside."

In *Simmons vs. Millville,* 75 N. J. L., 177, Justice Swayze said:

> "We can not doubt that both churches and factories, and perhaps the railroad, *are benefited in their use, if not in the market value of the properties,* by the construction of the sewers."

In *State, N. J. R. R. & T. Co. vs. Elizabeth* (1875), 37 N. J. L., 330 at 334, Justice Depue approved of the doctrine that "the influence of the proposed improvement on the present *market value of the property*" is a test of whether such property has a "present benefit" from such improvement. Although the assessment was set aside in that case, he intimated very strongly at page 335 that, notwithstanding the property assessed was one-third of a mile away, yet if there were a fair probability of the system being extended, the assessment would have been valid. This is one of the cases relied on by the respondent, but surely a fair reading of the case supports the contention of the appellant rather than the respondent.

In *Morris vs. Bayonne* (1891), 53 N. J. L., 299 at 306, the Court says:

> "It appears, without dispute, that this property has in fact been benefited by an increased *market value to* the full value extent of the assessments. For this reason the prosecutors who make this objection have not made a case for relief."

At page 305 the Court said:

> "When an assessment on property is certified to have been imposed for benefits, it will be presumed that the property has been in some mode benefited, and the presumption can only be overcome by clear and cogent proof."

Mr. Reynolds, who was called as a witness by the prosecutor, testified that, in his opinion, the

market value of the property assessed had been increased by the sewer being in Wilmer Street (case, p. 14, l. 20-25). Mr. Benjamin, a real estate agent, gave similar testimony (case, p. 16, l. 1-10). And there is no testimony to the contrary.

Mr. Benjamin's testimony also shows the character of the soil and the difficulty of maintaining cesspools on the land and gives this as an additional reason for benefit (case, p. 15, l. 30-40).

If it is open to argument, the case of *Davis vs. Newark,* 54 N. J. L., 144, at page 148 points out the distinction between benefits to the land and to the owner. In that case it was contended that the change of grade had been of benefit to the Horse Car Company and therefore that the land of the company, being a strip in the middle of the road which had been dedicated, should have been assessed, but it was held that the "land burdened with the public easement would in no respect be increased in value thereby" and that any benefit was to the franchise and therefore the failure to assess was not erroneous.

State, Van Solingen vs. Harrison, 39 N. J. L., 51 at 53.

Assessment for sewer benefits.

Commissioners considered certain short lots would have the same convenience for taking away water as the deeper lots and assessed the lots according to special benefits conferred. At page 54 the Court says:

> "The evidence shows that the benefits were not exceeded. There may be some inequalities in the assessment, but absolute equality is unattainable, as men of fair judgment would differ in their opinion as to the proper distribution of the costs and expenses of sewers, according to the established legal rule."

"There must be a clear preponderance of proof to lead the Court to overturn the work of the commission, which has the advantage of viewing the premises."

The Borough act provides

"for the selection of certain freeholders whose judgment on the amount of the benefit received is to be accepted as accurate unless it is made to appear, by clear and convincing proof, to be erroneous."

Coward vs. North Plainfield, 63 N. J. L., 61 at 64 (Sup. Ct., 1899).

"It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the Courts to be illegal."

State, Agens vs. Newark (Ct. E. & A., 1874), 37 N. J. L., 415 at 422.

State vs. New Brunswick, 38 N. J. L., p. 190, (1875).

The Supreme Court in setting aside sewer assessments in that case says at page 195:

"An assessment for a street or sewer so apportioned on the lands that it happens to be coincident with the proportion of area of those lands, may, like an assessment of frontage, be according to the rule of benefits as established by law, and if commissioners, acting under that rule, so find and assess property, that is, if they, in assessing property specially benefited, under the proper rule for such assessments that the area or frontage of the assessable property corresponds with the benefits to such property, it would be a proper assessment, and sustainable in the absence of evidence to show an error in judgment; the mere fact that an

> assessment laid on property peculiarly benefited in proportion to benefits, ~~and limited in proportion to benefits,~~ and limited thereto, corresponds with area or frontage, will not overturn such assessments."
>
> State, Gobisch vs. Inhabitants of North Bergen, 37 N. J. L., 402.

In this case, after the petition for the improvement had been presented to the governing body, one of the petitioners conveyed all of his property fronting on the street improved, 25 feet in depth, reserving to himself the rear property. At the time the assessment was levied, Gobisch was not the owner of the frontage and insisted that his lands in the rear of the 25 feet conveyed by him were removed from liability to assssment.

The Supreme Court (Justice Van Syckel writing the opinion) held that his rear lands were liable and said:

> "If by this device, Gobisch could have secured immunity for his lands, he might, with equal facility, have conveyed away a ribbon of land one inch wide, along the street, which could not possibly have received benefits commensurate with the cost of the improvement, and thus have thrown the entire burden upon the general tax levy. This would open a door to fraud and imposition which could not be countenanced."

The Court also held that the commissioners had erred in confining the assessment to the lands fronting on the avenue improved because the statute had provided that the cost should "be assessed upon all lands benefited thereby in proportion to the benefits received."

State, Kellogg vs. Elizabeth (1878), 40 N. J. L., 274 is relied on by the respondent. But in that case the assessment was made against lands which

were removed from the sewer and could not reach the sewer directly or indirectly without the building of connecting sewers. This was before the act of 1895 hereinafter mentioned and the facts are not parallel with the case at bar. Moreover, this case was explained in *State, Henderson vs. Jersey City,* 41 N. J. L., 459, at 492.

In the matter of the drainage along Pequest River (1877), 39 N. J. L., 433 is another case cited by the respondent. I fail to see that it is an authority in this case. There an assessment had been made before the work was completed upon lands which were intended to be benefited by the drainage scheme. The testimony was conflicting as to whether the land needed to be drained and the many probabilities were so speculative, that the assessments were set aside. Even in this case at page 437 the Court suggested that a different rule might be applicable to assessments for sewers and street improvements.

State, Henderson vs. Jersey City (1879) 41 N. J. L., 489.

This case involved the question of sewer assessments and the same were affirmed. A part of the lands assessed lay between 200 and 300 feet westerly of the nearest terminal point of the sewer constructed while another part was upon another street but nearer the work. As in that case, so in the case at bar, the commissioners considered the lands assessed had received a present benefit. The Court at page 493 said:

> "No assessment probably has ever been or ever will be laid, against which witnesses, intelligent and conscientious, may not be brought, who will differ with the authority appointed to judge and decide, both as to the fact and amount of benefits conferred."

The respondent seems to recognize this case as an adverse one but endeavors to break its force

by asserting, without any proof, that there is no present benefit to the church property. The presumption is the other way and the testimony of the commissioners is opposed to this view. The assessment was much lower, in proportion, than the assessment against the lands of the Presbyterian Church located in the rear of the land in question.

The respondent relies mainly upon *King vs.* Reed (1881), 43 N. J. L., 186. Not only was this decided before the act of 1895 mentioned in this brief, but the facts are also very different. Although the Court set aside the assessments against certain properties'' lying at a distance from the improvement, with the property of others intervening, yet the Court pointed out that:

> ''It is true, that because these lots are so disconnected from the sewer it does not necessarily follow that a benefit may not arise from the flowage of surface water therefrom.''

It then took up the consideration of the possibilities of this benefit and concluded that the benefit did not exist and pointed out also that no benefit could accrue ''until the construction of laterals.''

However, the Court also held at page 193 that:

> ''The assessments upon the other class of lots are not invalid by reason of a want of facility for connecting with the sewers.''

McKevitt vs. Hoboken (1883), 45 N. J. L., 482, involved the contention that, because certain lands removed from the sewer improvement and situate on other streets, had not been assessed, the assessment against properties along the line of the sewer was illegal. But the Court held otherwise. It does not warrant the legislature which has been modified by later decisions, and practically abrogated by the act of 1895.

Property not on the line of a main sewer may be benefited by bringing an outlet for sewerage

nearer to the property and "it is not essential to the validity of an assessment that the property should abut upon the street or place where the sewer is laid."

Beckett vs. City of Portland (1909), 99 Pac., 659.

IV

The act of 1895 applies to boroughs and sanctions the assessment.

The title of the act of 1895 (P. L., 1895, page 95; 3 C. S., p. 3580) is as follows:

> "An act concerning the making and collecting of assessments for benefits conferred, by the construction of sewers and drains."

And the first section expressly authorizes the assessment of lands within the *sewage area*. This section reads as follows:

> "1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that where in any city, or other municipality sewers or drains have been or may be constructed forming part of a general system of sewerage or drainage for such city, or other municipality, or part or parts thereof, it shall and may be lawful in assessing the benefits conferred, by the construction of any main, trunk or intercepting sewer or drain, forming a part of such system, to assess such benefits not only upon the lands and real estate fronting or abutting on the line thereof, but also upon all the lands and real estate situate in and throughout the entire sewerage or drainage area or district in such city, or other municipality, and through which

sewers or drains the whole or a part of the sewerage or drainage of such area or district, directly or indirectly, finds or will find an outlet."

The fourth section relating to lateral or connecting sewers is as follows:

"4. And be it enacted. That in all cases of sewer or drain assessments made for benefits conferred by the construction of any lateral or connecting sewer or drain, forming a part of the general system aforesaid, and upon the lands and real estate fronting or abutting on or in the vicinity of the line of such lateral or connecting sewer or drain, no assessment was made for benefits conferred or likely to be conferred by the construction of any main, trunk or intercepting sewer or drain, and through which such lateral or connecting sewer or drain has or will have an outlet for its sewerage or drainage, it shall and may be lawful to include in such assessment not only the cost or part of the cost of such lateral or connecting sewer or drain, but so much of the cost of the main, trunk or intercepting sewer or sewers, drain or drains, with which the same is connected and through which it finds an outlet, as the said lands and real estate shall be peculiarly benefited by the construction of said main, trunk or intercepting sewers or drains, or any part thereof."

The act of 1895 has been before the Courts several times and declared constitutional. As late as 1900 this Court re-affirmed the former cases in the case of *Brown vs. Town of Union,* 65 N. J. L., 601 (48 Atl., 562), and at page 602 Justice Dixon says:

"The manifest intent of that act is that, whenever sewers are constructed in any

> municipality at public expense and special benefit accrues therefrom to private land within the corporate limits, an assessment for the benefit shall be imposed on such lands, and the act prescribes constitutional regulations for the levying of such an assessment."

In *Simmons vs. City of Milville,* 75 N. J. L., 177 (66 Atl., 895) decided by the Supreme Court in 1907, the Supreme Court (Justice Swayze writing the opinion) set aside an assessment because it had not been made according to the act of 1895 and held:

> "Since the act of 1895 is constitutional, general, and mandatory, sewer assessments in all cities (sic) must be made in conformity with its provisions."

As that act applies not only to cities but also to all other municipalities, boroughs are necessarily included and the assessment in question must therefore be sustained because the land assessed was within the "sewerage area" and "in the vicinity of the line of such lateral or connecting sewer." In fact it was only 500 to 600 feet removed from the line of the main trunk sewer itself and therefore, "Situate in the vicinity of the line of such main sewer" as mentioned in Section 2 of the act of 1895.

V

The Court will not disturb the assessment unless it clearly appears that it exceeds the benefit.

This rule is fundamental. The principle was enunciated very clearly in *Pudney vs. Passaic,* 37 N. J. L., 65. At page 67 Justice Scudder, speaking for the Supreme Court, says:

> "The Court will not disturb an assessment because there are conflicting opinions concerning the justice or sufficiency of the assessment; it must clearly appear to their satisfaction that injustice has been done, before an assessment will be set aside upon the facts."

In *Hunt vs. Rahway*, 39 N. J. Law, 646, Justice Dixon speaking for the Supreme Court, at page 647, says:

> "Still, in determining such questions, the official certificates of the commissioners, under their oath and in the line of their duty, are entitled to much weight as evidence, and only clear proof of great force will justify us in concluding that they are erroneous."

In that case the commissioners had assessed the benefits largely in proportion to the frontage, except as to some lots near the business centre which were more valuable and derived a larger share of advantage, and some lots which were near to intersecting opened streets and thereby more beneficially affected. The commissioners also determined in that case that certain lands lying more than 100 feet on the avenue were not benefited, and therefore were not assessable. In speaking of this method of assessing, at page 648, the Court says:

> "There is nothing in the evidence which satisfies me that any of these conclusions is subject to just criticism. They are all consistent with and even sustain the idea that the commissioners, in performance of their legal functions, fairly exercised a rational judgment in the distribution of burdens according to benefits."

This case was affirmed in the Court of Errors.

Hunt vs. Rahway, 40 N. J. L., 615.

In *Jeliff vs. Newark,* 48 N. J. L., 101, the principle above enunciated was again endorsed. At page 109, Justice Dixon says:

> "The area of special benefit is so largely a matter of opinion that the judgment of the commissioners on that subject must stand, unless very convincing evidence be adduced against it."

In *Muller vs. Bayonne,* 55 N. J. L., 102, speaking of the attitude of the commissioners of assessment, Justice Dixon says at page 103 near the bottom:

> "No doubt the commissioners, in determining the benefit derived by the entire tract, should take into consideration not only the uses made or contemplated by the owner, but also the uses which a wiser owner would contemplate, and may levy upon the tract an equivalent for the benefits received in view of such uses."

In *DeWitt vs. Elizabeth,* 56 N. J. L., 119, the Court at page 125, again reiterated the view that in case of doubt, "the judgment of the commissioners should prevail," and further, the Court said, on the same page, that the objection that "the benefits were distributed along the line of the improvement in proportion to the frontage, does not necessarily make the assessment void."

Although in the case at bar the frontage was not the basis for the assessment, yet even if it had been under this decision it is clear that it would not necessarily be the cause for disturbing the assessment.

In *Central Land Co. vs. Bayonne,* 56 N. J. Law, 297, Justice Van Syckel, for the Court of Errors and Appeals, speaking of P. L., 1887, page 231, providing for the assessing of benefits for the construction of a trunk sewer upon all properties benefited, says at page 301:

> "The infirmity alleged to inhere in this act is that it imposes on property on the

line of the trunk sewer an assessment to the full extent of the benefits imparted to it, and directs the balance only of the cost of the work to be levied on other property within the area benefited."

"It may be therefore, that while property on the line of the trunk sewer may not be assessed in excess of the benefit conferred, the assessment upon it in proportion to the benefit received will be greater than that borne by land not on the line of the main sewer. This, however true, does not in my opinion render the act of 1887 abortive.

"It is competent for the legislature to authorize the assessment of the entire cost of a street improvement upon the frontage, provided it does not exceed the benefits. The excess of the cost over benefits may be imposed upon the general public. Legislation in further ease of the public tax levy may lawfully provide that such excess of cost shall, to the extent of benefits, be laid on other lands not on the line of the work. All lands of the same class—that is, all lands on the frontage—must be assessed in the same proportion, but it has never been held in this State that to constitute a legal assessment all lands benefited must be assessed, or that all lands benefited must be assessed in the same proportion. Measured by such a rule it is doubtful if any assessment hitherto made in this State can be upheld."

In *Sinclaire vs. West Hoboken,* 58 N. J. Law, 129, the Supreme Court laid down the rule that it was the duty of the commissioners of assessment to "exercise their own judgment in defining the

area of land which was specially benefited by the improvement."

In *Coward vs. North Plainfield,* 63 N. J. Law, 61, at page 64, it is said:

> "The statute under which this assessment is made provides for the selection of certain freeholders whose judgment on the amount of the benefit received is to be accepted as accurate unless it is made to appear, by clear and convincing proof, to be erroneous."

This case would also seem to be authority for the view that, inasmuch as the total assessment against the property of the respondent, both as to the Green Village and Wilmer Street portion, did not, in the opinion of the commissioners, exceed the benefits conferred upon the property and, inasmuch as there is no evidence to the contrary, the assessment should be confirmed and the proceedings dismissed, even though it should be considered by the Court that the dividing of this property in what the commissioners were pleased to designate the Green Village Road part and the Wilmer Street part, was within the criticism of the Court in *Coward vs. North Plainfield.*

VI

This Court can review the case.

In this case, the Commissioners of Assessment, the Special Committee appointed to consider the objections of the respondent and the Council of the Borough of Madison found as a fact that the lands of the respondent had been benefited to the extent of the assessment. On the other hand, the Supreme Court finds that, although no evidence was offered to show the property had not been benefited and that evidence was produced showing that the property had been benefited to the extent

of the assessment, yet the property is so situate that it is not subject to an assessment because no present use can be made of the sewer in Wilmer Street because a one-foot strip owned by another party separates the property from the street. This determination of the Court is not a finding of fact, as in *Moran vs. Jersey City,* 58 N. J. L., 653, but the asserting of a rule of law to govern in such cases and is therefore reviewable by this Court.

Vreeland vs. Bayonne, 60 N. J. L., 168.

The truth is the Supreme Court did not find as a fact that the land was not benefited by the sewerage system of Madison, but held that land situate as the land of the prosecutor "became unassessable for any benefits deemed to have been conferred upon the lot in question" (case 41 ll. 25-30) and that "to warrant an assessment for the construction of a sewer, the property must be capable of a present appreciable benefit, by direct connection with such sewer" (case, 41, ll. 30-35).

As a matter of fact, the land assessed is receiving present benefit of the sewerage system of Madison by a connection on Green Avenue by means of pipes laid over the public school lands, and, without the use of this system, the parochial school could hardly have been maintained, at any rate, without great expense for cleaning cesspools. If there must be a "present appreciable benefit by direct connection with such sewer," than I insist that the land being connected with the system, though not on Wilmer Street, it is assessable and the assessment should stand.

But the first part of the quotation from the Supreme Court opinion shows that the Court did not give the force to Section 58 of the Borough Act that the Legislature appears to have intended, while the latter part shows that the act of 1895 was entirely overlooked.

Finally

This assessment was made by three men of standing, one of whom is a real estate agent and another a large dealer in real estate. Upon objections being offered by the church, the report of the commissioners was referred to a special committee of the Council, one of whom, Mr. O'Brien, is a member of St. Vincent's Church. This committee made a unanimous report in which they certify that they carefully considered all objections and the report, and, after recommending certain amendments not affecting the Church, they state the other objections should be overruled and the report be adopted (case 34, ll. 1-25).

The report was then unanimously adopted and approved by the Council. The testimony offered in this case all shows the land affected has been benefited and no evidence has been offered to the contrary. In view of all this, I respectfully submit that the assessment should not and can not be set aside legally. The Supreme Court has erred in its view of the effect of the amendment to Section 58 of the Borough Act and also failed to consider the effect of the act of 1895. It also misinterpreted the effect of the decisions in cases of this character.

Therefore the judgment of the Supreme Court should be set aside and the assessment affirmed.

Certainly, until the Borough seeks to enforce the collection of the assessment, the Church can not complain because the assessment is entitled to stand as a valid assessment. It may be considered that the right to enforce it can not exist until the Church either acquires the one-foot strip or rights over it. I do not concede this but suggest this

merely as an additional reason why the assessment should stand and the judgment of the Supreme Court should be reversed.

Respectfully submitted,

CHARLES A. RATHBUN,

Attorney and of Counsel with the Appellants.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

New Jersey Court of Errors and Appeals.

ST. VINCENTS CHURCH, MADISON, a corporation,
Respondent and Prosecutor,

VS.

THE COUNCIL OF THE BOROUGH OF MADISON,
Appellants and Defendants.

BRIEF FOR RESPONDENT.

The respondent is the owner of a tract of land in Madison, Morris County, New Jersey, having a frontage of three hundred and fifty feet on Green Village Road and an average depth of five hundred feet. This lot runs parallel to Wilmer Street but is separated from this street by a strip of land one foot in width, owned by Miss Alice L. Green. The respondent has no easement or right over this strip. On the lot of the respondent at the time of the assessment, there was erected a church, rectory and sexton's house; the rectory and church are connected with the sewer on Green Village Road and the sexton's house with the sewer on Green Avenue.

A parochial school building is being erected on the rear of the church lot.

The respondent was assessed the sum of two hundred and eighteen dollars and ninety cents on Green Village Road, which it has paid.

There was an assessment of twenty-five dollars levied on the one-foot strip of Miss Green on Wilmer Street.

There was also assessed against the respondent on Wilmer Street the sum of two hundred and sixty-four dollars and it is to this assessment that objection is taken.

POINT I.

Section 92 of the Borough Act has received judicial interpretation in Cook *v.* Allendale, 50 V., 285, where the *application* for the writs was delayed from December 29, 1908, until May, 1909, a period of over four months, and the Court on page 290 said:

> "the writs are disallowed solely upon the ground that they were not *applied* for within the thirty days from the date of the confirmation of the assessment."

In this case the assessments were confirmed November 25, 1912. The application for the writ was made December 21, 1912, within thirty days from the date of confirmation, page (1), and thus within the legal time. The decision of Justice Voorhees page (40), speaks of the time as of *November* 21, which is a clerical error.

POINT II.

The writ of *certiorari* was directed to

> " the council of the Borough of Madison, F. Irving Morrow, Collector of Taxes of the Borough of Madison in the County of Morris, and Samuel G. Willets, Clerk of said Borough " (7).

"That the mayor and Councilmen of every borough shall constitute the council thereof" is admitted by the brief of the appellant. The return was made, to quote from appellant's brief, "by the gentlemen composing the council of the borough of Madison, viz., the Mayor and six councilmen". Thus the very persons who represent the appellant and who would have made the return have done so.

In the case of Davis *vs.* Town of Harrison, cited by our adversary, the application was made for dismissal of the writ because it was not directed to the Clerk, and the Court held that the custody of the Clerk was the custody of the corporation and followed, "The practice, therefore, is to direct the writ to the principal, and not to the mere agent," "The Borough of Madison" is before the Court as appears by the return and this objection is without merit.

There appears in the record full justification for the issuance of the writ to the Council of the Borough of Madison. The report of the Commissioners of assessment is "To the Council of the Borough of Madison" (21). The resolution accepting the report opens, "Be it resolved by the Council of the Borough of Madison" (25). All the minutes are the minutes of the "Council" (28 *et seq.*): the report of the special committee, appointed to investigate the complaints, was approved by a resolution of the "council of the Borough of Madison."

When this case was before the Supreme Court the appellant made a motion for dismissal for the reasons given under Point Two, and this motion was denied. The respondent made motion to amend the name from "the Council of the Borough of Madison" to "Borough of Madison" which motion was allowed and entered, making such change.

POINT III.

The Supreme Court clearly distinguishes between a street opening and sewer extension. By a large number of adjudicated cases in this State it has been held that land not fronting on a street may be assessed for benefits conferred by such opening or improvement; but the decisions clearly distinguish between a street opening and an assessment for sewer benefits.

POINTS IV, V, VI.

These points in appellants' brief do not treat of the question before the Court.

It is respectfully submitted that the Commissioners having assessed the land of Miss Green along Wilmer Street cannot assess the respondent's land for alleged sewer benefits on Wilmer Street when there is no access to the street; furthermore

The assessments are laid *on a basis of street frontage* and the result of a confirmation of the assessment is to compel payment by respondent of a larger proportion of cost than is borne by any other land owner.

A.

THE RESPONDENT DERIVES NO BENEFIT FROM THE SEWER ON WILMER STREET.

The defendants contend that inasmuch as the respondent is constructing a parochial school on the lot, the assessment is authorized.

Aside from the fact that no access can be had to Wilmer Street from the lands of the respondent, and treated under Point B herein, it is respectfully submitted that, to support the assessment, there must be some present appreciable benefit.

Law.

In the State, William L. Morris, Prosecutor, *vs.* The Mayor and Common Council of the City of Bayonne, 53 L., 299, it was held that:

> "An assessment on property as presently benefited by the construction of a sewer, must be presumed to have been made on the ground of some present appreciable benefit. When it is shown by clear proof that the property cannot, without the construction of lateral sewers, connect with the main sewer for drainage, and that surface water is not carried therefrom by said sewer in a mode appreciably better than that previously afforded by the configuration of the land and natural water courses, no benefit has been conferred on the property sufficient to justify a present assessment."

New Jersey Railroad and Transportation Company *vs.* Elizabeth, 8 V., 330.

Kellogg *vs.* Elizabeth, 11 Vr., 274.

Henderson *vs.* Jersey City, 12 Vr., 489.

King *vs.* Reed, 14 Vr., 186.

McKevit *vs.* Hoboken, 16 Vr., 482.

In New Jersey Railroad and Transportation Company *vs.* City of Elizabeth, *supra*, the Court, on page 333, said:

> "It (the assessment) must therefore be affirmed, unless its imposition in this case, is a violation of the principles laid down in the Tide Water case, that an assessment on an individual owner towards defraying the costs of a local improvement must be founded on some peculiar benefit derived by him from its construction over and above that of the public, and that the amount which he may lawfully, be required to contribute to that end, is limited to the *quantum* of benefit he receives. * * * It does not afford a

means of drainage of the prosecutor's lands, the surface water therefrom being discharged in another direction into the Elizabeth River, and is incapable of being used for such drainage, without being connected therewith by means of other sewer connections, which have not yet been projected. The proof is, that the sewer in its present condition is of no benefit to the prosecutor's lands."

In State, Edward R. Kellog, *et als.*, *vs.* The City of Elizabeth, *supra*, the Court on page 276, said:

"The special and peculiar benefit which will legalize an assessment for the expense of a local improvement, must be a *present* benefit immediately accruing from the construction of the work in question. Land owners cannot be assessed for intended benefits which may never be realized; mere speculative benefits are not, in reality, benefits."

See In Matter of Drainage along Pequest River, 10 Vr., 433, where on page 436 the Court said:

"Since the cases of State, Agens, Pros. *vs.* Newark, 8 Vr., 415; Passaic *vs.* Del., Lack. & W. R. R. Co., 8 Vr., 538, and other cases holding the same principle, it has been settled that special assessments for improvements must not exceed the benefits conferred; and where there are no benefits there can be no special assessments."

In McKevitt *vs.* Hoboken, *supra*, it was held that

"no person whose lands are not so placed as to permit of a present connection with the sewer can be assessed for the benefits."

B.

THE RESPONDENT cannot be assessed for the sewer on Wilmer Street, as it has no frontage on said street.

In King *vs.* Reed, 14 Vroom, 186, the Court, on page 192, said:

> "In regard to the assessment upon the lots included within the latter class I am unable to discover any ground upon which they can be supported. As already mentioned in their classification none of them have any connection with the sewer, and between each of such lots and the sewer, lie tracts of land over which the owners of the lots have no control.
>
> "To the owners of these lots no benefits can accrue from this sewer as a conduit for sewerage until the construction of laterals; State, Kellogg, Pros., *vs.* Elizabeth, 11 Vr., 274, and on page 193."
>
> "I am unable to discover any source of benefit at all to these lots, and if there existed some such, yet the fact that the benefits were partly, not entirely imposed on account of the utility of the sewer for drainage purposes is sufficient to vacate the assessment on these lots."

In Kellogg *vs.* Elizabeth (11), 274, at 277, the Court said:

> "It by no means follows from this that the property lying on the line of intended laterals must escape assessment for the expense of making the trunk sewer. * * * When the laterals are built so that sewerage through the mains is furnished to this property, then it will be lawful for the corporation to reimburse itself for the cost, not only of the laterals but also this principal sewer so far as the peculiar advantage then accruing to that property will warrant."

In Henderson *vs.* Jersey City, 12 Vr., 489, the Court upheld the assessment because of (*a*) the large discrimination in the assessment between land facing the sewer and those removed, and (*b*) because there was a present benefit.

In the case at bar there is no present benefit and can be no connection to the sewer on Wilmer Street.

In McKevit *vs.* Hoboken, 16 Vr., 482, at 486, the Court said:

> " Now it is clear that until these properties were placed in a position by which they could connect through these branch sewers with the present sewer, they could not be assessed for cost of the latter improvement."

The respondent having paid its sewer assessment on Green Village Road has performed its full legal as well as moral duty, and respectfully submits that the judgment of the Supreme Court should be sustained.

KING & VOGT,
Attorneys for and of Counsel with
Respondent.